

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

RICHARD ANDERSON, ) Case No.: 2:07-cv-01117-RCJ-RJJ  
                        )  
Plaintiff,             )  
                        )  
vs.                    )  
                        )  
LENARD VARE et al., )  
                        )  
Defendants.           )

Before the Court is Plaintiff Richard Anderson's Motion to Reconsider (#53). Plaintiff brought the instant motion on April 26, 2010, following this Court's March 31, 2010 Order (#52) entered by Judge Robert Jones. Defendants filed a timely Response (#54) and Plaintiff filed an untimely Reply (#56).

## BACKGROUND

Plaintiff Richard Anderson is a Nevada state prisoner housed by the Nevada Department of Corrections (“NDOC”). Plaintiff claims to be a Native American, although he does not allege any particular tribal affiliation or enrollment. (*See* Complaint ¶ 1). On September 15, 2006, Anderson was transferred from the Southern Desert Correctional Center (“SDCC”) to the Southern Nevada Correctional Center (“SNCC”) as part of an older inmate work force. Upon his arrival at SNCC, Plaintiff asked Defendant Lenard Vare about the availability of land for Native American religious use. Vare informed Plaintiff that SNCC was a new facility and that no land at SNCC had yet been specifically designated for such use, but that plans were being “worked on.” The land that SNCC had previously allowed Native American inmates to use for religious rituals had been annexed to a women’s unit to alleviate overpopulation at the women’s facility. Defendants told Anderson that because the land once used for rituals was now part of the female

1 housing unit, he would not be allowed to use it. Defendant Vare further informed Anderson that  
2 land at SNCC might be available for Native American use as early as March 2008. Plaintiff  
3 requested that he be transferred to another facility if Native American land was not immediately  
4 available. Vare informed Plaintiff that the chapel at SNCC was available for Native American  
5 rituals and in fact had been utilized for this purpose in the past. The SNCC chapel was not  
6 restricted to use by inmates of any particular faith.

7 On December 7, 2007, Plaintiff was transferred back to SDCC based on his request for  
8 access to land used exclusively for Native American religious ceremonies. In the meantime, on  
9 August 20, 2007, Plaintiff filed a Complaint in this Court pursuant to 42 U.S.C. § 1983 and the  
10 Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc-1. The  
11 Court granted Defendants’ motion for summary judgment, and the Court of Appeals affirmed  
12 except as to the RLUIPA claims asserted against Defendants Vare, Howell, Corenze, and  
13 Dreesen. The Court of Appeals vacated and remanded summary judgment on the RLUIPA  
14 claims as to those Defendants, because the district court did not apply the proper standard of  
15 religious rights under RLUIPA, but only the standard set by the Free Exercise Clause of the First  
16 Amendment, which is not as strict as RLUIPA. *See Cutter v. Wilkinson*, 544 U.S. 709, 714  
17 (2005); *see also Alvarez v. Hill*, 518 F.3d 1152, 1154–57 (9th Cir. 2008). On April 1, 2010, the  
18 Court ruled that the remaining Defendants were entitled to summary judgment on Plaintiff’s  
19 claims under RLUIPA. Specifically, the Court held that Defendants were entitled to absolute  
20 immunity as to monetary damages. The Court also held that Plaintiff’s claim for injunctive relief  
21 failed as a matter of law.

## 22 DISCUSSION

### 23 A. Legal Standard for Motion to Reconsider

24 A motion to alter or amend a judgment must be made within twenty-eight (28) days of  
25 entry of judgment. Fed. R. Civ. P. 59(e) (2010). Here, judgment was entered on April 1, 2010,

1 and the present motion was filed twenty-five days later on April 26, 2010. Therefore the motion  
2 to reconsider is timely under Rule 59(e) and should be considered under that rule as opposed to  
3 Rule 60(b). *Am. Ironworks & Erectors, Inc. v. N. Am. Contr. Corp.*, 248 F.3d 892, 898-99 (9th  
4 Cir. 2001) (“[A] motion for reconsideration is treated as a motion to alter or amend judgment  
5 under Federal Rule of Civil Procedure Rule 59(e) if it is filed within ten days of entry of  
6 judgment.”). On December 1, 2009, the time to file a Rule 59(e) motion was extended to  
7 twenty-eight days. *Compare Fed. R. Civ. P. 59(e)* (2010), *with Fed. R. Civ. P. 59(e)* (2009).  
8 This rule prevents parties from seeking reconsideration of a judgment based on a court's own  
9 errors of law after the time for filing a motion under Rule 59(e) has run by attempting to invoke  
10 Rule 60(b), which only permits amendment of a judgment based on circumstances external to a  
11 court's own actions. *See, e.g., Hahn v. Becker*, 551 F.2d 741, 745 (7th Cir. 1977) (“[T]he relief  
12 sought by the defendants is correction of errors of law and is not of the type contemplated by  
13 Rule 60. As this court has emphasized, it will not permit parties to circumvent the service  
14 requirement of Rule 59(e) by merely denominating the motion as one made under Rule 60.”).

15 A Rule 59(e) motion is appropriate “if the district court: (1) is presented with newly  
16 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or  
17 (3) if there is an intervening change in the controlling law.” *Circuit City Stores, Inc. v. Mantor*,  
18 417 F.3d 1060, 1064 (9th Cir. 2005) (quoting *Sch. Dist. No 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)); *see also 389 Orange Street Partners v. Arnold*, 179  
F.3d 656, 665 (9th Cir. 1999).

21 **B. Analysis**

22 In the present case, Plaintiff seeks reconsideration on the grounds that District Judge  
23 Jones' summary judgment for Defendants conflicted with Magistrate Judge Johnston's discovery  
24 order, that there was inadequate time for discovery in the case, that this Court failed to  
25 adequately analyze the law under RLUIPA and apply the correct legal standards, and that the

1 Court failed to demand detailed evidence from Defendants. None of these arguments has  
2 sufficient merit to warrant granting Plaintiff's motion. In short, Plaintiff fails to demonstrate  
3 new evidence, clear error or manifest injustice, or an intervening change in controlling law.  
4 Accordingly, denial of Plaintiff's motion is required.

5 **1. Discovery**

6 As to Plaintiff's contentions regarding the evidence in the case, they are clearly without  
7 merit. The mere fact that the magistrate judge entered a discovery order does not in any way  
8 limit this Court's ability to hear and decide dispositive matters. The relevant inquiry is whether  
9 the standard under Federal Rule of Civil Procedure 56 was applied correctly, which it was. The  
10 Court need not permit full discovery before granting summary judgment, nor did Plaintiff seek a  
11 Rule 56(f) continuance. *See Barona Group of Capitan Grande Band of Mission Indians v.*  
12 *American Management & Amusement, Inc.*, 840 F.2d 1394, 1400 (9th Cir. 1987) (finding the  
13 district court did not abuse its discretion where the party opposing summary judgment did not  
14 file a Rule 56(f) motion stating what additional information remained to be discovered and how  
15 it would preclude summary judgment). Rule 56(c) itself states that "a party may move for  
16 summary judgment *at any time* until 30 days after the close of discovery." Fed. R. Civ. P. 56  
17 (emphasis added). In the instant case, the Court determined that sufficient discovery had taken  
18 place, and sufficient evidence was presented to the Court to determine that Plaintiff's claims  
19 failed as a matter of law, regardless of whether or not further discovery were permitted.

20 **2. RLUIPA**

21 As to Plaintiff's substantive arguments, they are insufficient to demonstrate that clear  
22 error or manifest injustice was the result of this Court's prior order. The Court determined that  
23 the burden on Plaintiff's religious beliefs imposed by the ban on the burning of sage in his cell  
24 was subject to strict scrutiny, but that the State of Nevada had compelling interest in preventing  
25 intoxication and criminal behavior, as well as rehabilitating its inmates. Further, the State of

1 Nevada's ban on burning substances in prison cells, such as sage which has a strong smell that  
2 can be used to mask the smell of intoxicants and other contraband, was the least restrictive  
3 means to accomplish the State of Nevada's compelling interest.

4 The Court's Order granting Defendant's Motion for Summary Judgment determined that  
5 Defendants' offer to allow Plaintiff to use the chapel for his ceremonies made his claim of  
6 deprivation of rights unmeritorious. (April 1, 2010 Order at 9:1–3, #53). However, Plaintiff now  
7 claims in his Motion for Reconsideration that while Plaintiff was alternatively offered the use of  
8 the prison chapel for his ceremonies, this accommodation does not necessarily make his claim of  
9 deprivation of rights unmeritorious because Plaintiff was still prevented from burning sage, even  
10 in the chapel. There does appear to be a genuine issue of material fact as to whether Plaintiff  
11 was allowed to burn sage in the chapel. Plaintiff claims that he was not allowed and Defendants  
12 have not attempted to rebut this claim. Therefore, this Court will assume, for purposes of  
13 summary judgment review that Plaintiff was not allowed to burn sage in the chapel. It should be  
14 noted, however, that Plaintiff has raised this allegation in his motion to reconsider rather than in  
15 his Complaint. As Plaintiff has not sought to amend his Complaint post-appeal, the Court need  
16 not consider his claims not contained in the Complaint. Regardless, the Court is convinced that  
17 Plaintiff's claims were properly subject to the summary judgment motion.

18 Plaintiff implies that the issue is whether a total ban on the use of sage burning  
19 (smuggling) in a prison cell or in a prison chapel as part of a religious worship is the least  
20 restrictive means of maintaining security. Under RLUIPA, prison officials bear the burden of  
21 establishing that the restriction challenged is the "least restrictive alternative to achieve" a  
22 compelling governmental interest. *See Warsoldier*, 418 F.3d at 998. "[N]o longer can prison  
23 officials justify restrictions on religious exercise by simply citing to the need to maintain order  
24 and security in a prison." *Alvarez v. Hill*, 518 F.3d 1152, 1156–1157 (9th Cir. 2008) (citing  
25 *Greene v. Solano County Jail*, 513 F.3d 982, 989 (9th Cir. 2008)). Prisons must now demonstrate

1 that they “actually considered and rejected the efficacy of less restrictive measures before  
2 adopting the challenged practice.” *Warsoldier*, 418 F.3d at 999. To succeed on its Motion for  
3 Summary Judgment, Defendants must demonstrate that restrictions on Plaintiff’s religious  
4 exercise were the least restrictive means of maintaining prison security. While prison  
5 administrators are to be accorded deference with regard to prison security, Defendants must  
6 show that they “actually considered and rejected the efficacy of least restrictive measures before  
7 adopting the challenged practice.” *Id.*

8 However, Plaintiff admits that areas of land dedicated to the burning of sage for religious  
9 purposes exist outside every other prison facility except the one where he had recently arrived.  
10 (Motion to Reconsider at 5, #53). According to Defendants, upon arrival to SNCC, Defendant  
11 Vare informed Plaintiff that because he was in a new facility, no land had yet been designated for  
12 such use, but that plans were being “worked on” and he could use the chapel instead. (Vare Aff.  
13 at 1:7–2:13, #16 Ex. E). Unsatisfied with this accommodation, Plaintiff admits he was  
14 transferred to another facility, SDCC, an older facility that did provide him access to land  
15 specifically designated for Native American religious ceremonies. (Opposition to Motion to  
16 Dismiss and Summary Judgment at 9:14–15, #25). The grievance forms attached to Plaintiff’s  
17 Opposition to Defendant’s Motion to Dismiss demonstrate that Defendants considered Plaintiff’s  
18 requests, including his request to burn sage in his room,<sup>1</sup> and elected to move Plaintiff in order  
19 facilitate his requests. (Exhibits attached to Plaintiff’s Opposition to Motion to Dismiss, #25).  
20 The disputed evidence as to whether or not Plaintiff *wanted* to be transferred from SNCC is  
21 immaterial to whether or not the prison officials’ conduct was constitutionally infirm. The least  
22 restrictive means used by the Defendants to accomplish its compelling interest was not just to  
23 prohibit the burning of sage in the cell or chapel in the new facility, but to transfer Plaintiff to  
24 one of the other prison facilities which had already completed the construction of a designated

25 <sup>1</sup> Notably, just as Plaintiff did not allege in his Complaint that he was prohibited from burning sage in the chapel, this is not evidenced in the grievance forms he has attached to his pleadings.

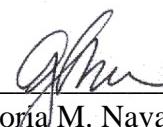
1 outdoor area enabling him to practice the burning of sage. This is sufficient to meet the showing  
2 required under *Warsoldier*, 418 F.3d at 999, as Plaintiff's own evidence demonstrates that prison  
3 officials considered his request and rejected allowing him to burn sage, instead transferring him  
4 to another facility.

5 Therefore, the Court is convinced that the analysis and conclusion of the previous  
6 summary judgment in favor of Defendants was correct. Plaintiff has not presented any evidence  
7 or argument sufficient to amend this judgment.

8 **CONCLUSION**

9 IT IS HEREBY ORDERED THAT Plaintiff's Motion to Reconsider (#53) is DENIED.

10 DATED this 14th day of July, 2010.

11   
12 \_\_\_\_\_  
13 Gloria M. Navarro  
14 United States District Judge